NO. 56990-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN HICKSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Clallam County Superior Court No. 21-1-00149-05

BRIEF OF RESPONDENT

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2. Whether a certified copy of a JABS printout showing prior protection order violations with Hickson's name, date of birth, and address, coupled with a certified copy of a Department of Licensing Driver's License photo showing Hickson's photo, date of birth, and address, and Officer Vandusen's testimony identifying Hickson as the person in the Driver License Photo and as the defendant constitutes sufficient evidence that Hickson committed prior violations of no contact orders as charged in counts 3 through 6?
3. Whether prejudice from the admission of extra convictions for violating no contact orders in Ex. 23 cannot be established because overwhelming evidence impeached Chapman's testimony and established Hickson violated the

no contact order in counts 3 through 6, and the defense theory admits Hickson tried to contact Chapman in violation of the no contact order?

II. STATEMENT OF THE CASE

On May 21, 2021, officers from Port Angeles Police Dept. (PAPD) responded to a reported assault at 2405 S. Eunice St. #103 in Port Angeles, Washington. CP 195. The reporting party, Jessica Chapman, claimed that her boyfriend Benjamin Hickson assaulted her and was outside threatening her with a knife. CP 195. According to PAPD Officer Jackson VanDusen, Hickson was no longer at the residence when officers arrived. CP 195.

Chapman told VanDusen that she and Hickson had been arguing all day and that Hickson punched her in the leg and wrapped both hands around her throat and squeezed for multiple seconds. CP 195. Hickson left a letter for Chapman and left the house only to come back later. CP 195. Chapman and Hickson began arguing again and Hickson began choking Chapman again with his hands around her throat. CP 195.

Hickson stopped again and left the house and Chapman locked him out and called 911. CP 195. Chapman could see Hickson holding something that looked like a knife and Hickson was threatening to kill her. CP 195.

Chapman's voice was raspy sounding as she spoke with VanDusen which was not normal for her, and she was experiencing throat pain. CP 195. VanDusen also observed a small amount of dots in Chapman's left eye that looked like petechiae. CP 195.

Hickson was arrested by PAPD for Assault in the Second Degree by Strangulation, Domestic Violence, and Felony Harassment, Domestic Violence. CP 196.

The State filed additional reports received from PAPD documenting that on May 25, 2021, a domestic violence protection order prohibiting Hickson from contacting Chapman was ordered by the court and signed by Hickson. CP 183. On June 4, 2021, the protection order was reissued post-arraignment. CP 183. PAPD Officer Ronald Cameron reported that Hickson

made multiple phone calls from the Clallam County jail asking an unknown male to communicate with Chapman a.k.a. Sunny Dukasis on Facebook. CP 183–84.

Officer Cameron reported that on June 2nd, 3rd, and 4th, 2021, Hickson exchanged multiple messages with Sunny asking her to help him make the case go away. CP 185–87.

On July 2, 2021, the State filed an amended information charging Hickson with Domestic Violence Crimes of Assault in the Second Degree by Strangulation, Tampering with a Witness, and four counts of Felony Violation of a Court Order for contacting Chapman on the 2nd, 3rd, 4th, and 20th of June 2021. CP 177–180, 16.

The case was tried before a jury commencing Nov. 29, 2021. RP 11. The State called PAPD Officer Jackson VanDusen as its first witness. RP 48.

Officer VanDusen's testimony

VanDusen responded to a domestic violence call shortly after 8:00 p.m. on May 21, 2012, at the 2400 block of South

Eunice Street in Port Angeles. RP 51. When he arrived, VanDusen interviewed Ms. Chapman. RP 52. Chapman appeared to be very panicked and paranoid and was visibly shaking. RP 52. VanDusen noted that Chapman's eyes were watery, and she was upset as she spoke in a raspy and shaky manner. RP 52–53. VanDusen also testified that Chapman had red marks on both sides of her neck and, based on his training, he observed a small amount of petechiae in Chapman's left eye which is often found in victims of strangulation. RP 53–54. VanDusen identified a photo of Chapman's neck which was admitted in evidence as State's Ex. 2. VanDusen identified photos of the other side of her neck (Ex. 4) and her left eye (Ex. 3) and these were admitted in evidence as well. RP 54–56.

Chapman gave VanDusen a letter that she said was handwritten by Hickson that she retrieved from her room. RP 56–57. This was admitted as Ex. 1. RP 58. Officers could not locate Hickson in the area at that time. RP 60–61.

The next time VanDusen heard from Chapman was around

11:00 p.m. that same night. RP 61. VanDusen arrived at Chapman's residence again but did not see Hickson. RP 61. Chapman called again to inform that Hickson was parked outside the apartment in a silver Pontiac car. RP 62. VanDusen and Officer Johnson located Hickson in the vehicle and asked him to step out of the car and arrested Hickson. RP 62.

After providing Hickson with his *Miranda* warnings, Hickson stated that it was the first time he had been to the apartment that day and that he and Chapman did not have a relationship with one another. RP 64. As to the note, Hickson said he left it at the apartment a few days prior. RP 64.

Hickson was taken to the Clallam County jail and VanDusen listened to Hickson's jail phone calls a couple days later. RP 65–66. VanDusen then logged onto Facebook to look for an account listed under Sunny Dukasis. RP 66, 78.

After finding the Facebook page associated with Dukasis, VanDusen identified a photo of three people and this was admitted as Ex. 5. RP 81–82. Chapman would later admit that

the photos were of herself, Hickson, and their son. RP 137–38.

The State introduced Ex. 7 through Officer VanDusen. RP 92. VanDusen identified Ex. 7 as an identification card for Benjamin Hickson. RP 93. VanDusen identified Hickson as the person he contacted on May 21, 2021, and as the defendant. RP 93. The State moved to admit Ex. 7 as a certified government document. RP 93. Defense counsel objected on the basis that "the best evidence is the officer's testimony of identification of my client, which he's already done." RP 93. The trial court overruled the objection and admitted Ex. 7 in evidence. RP 93.

The information on Ex. 7 includes the name Benjamin Charles S. Hickson, a picture of Hickson, his date of birth of June 23, 1983, and his address of 919 Turner Ave., Shelton, WA 98584. Ex. 7.

PAPD Officer Johnson's testimony

PAPD Officer Johnson testified that he also responded to the scene the night of the reported assault. RP 185. Johnson was familiar with Chapman from prior contacts and was familiar with

her voice and speech patterns. RP 185–86. Chapman approached him and he noticed very specifically that her voice was very rough and raspy and off her baseline. RP 185. Johnson asked Chapman how she was feeling and if he could summon a paramedic. RP 186. Johnson also offered to drive Chapman to the hospital but Chapman declined. RP 186.

Sergeant Waterhouse and Chirping from Jail

Sergeant Waterhouse, Clallam County Corrections Facility (CCCF), testified regarding the authentication of Ex. 19, the chirp text messages from Hinton while an inmate at CCCF. RP 277, 281. Waterhouse also testified about the C-Tel system used for recording text (chirp) messages and jail phone calls from inmates of CCCF. RP 268, 272, 282. Waterhouse explained how inmates must use their personal identification number to make chirps or phone calls. RP 274, 282.

Then Waterhouse identified Ex. 21 and Ex. 22 as thumb drives containing jail phone calls from Hickson recovered from the C-Tel system. RP 288–89, 293–95. Ex. 22 contained phone

calls identified by Waterhouse as Hickson speaking on May 26, June 4, and June 18, 2021. RP 288–89. Waterhouse identified the phone call on Ex. 21 as Hickson speaking on May 28 and June 3, 2021. RP 293–94. Both Ex. 21 and 22 were admitted in evidence. RP 293, 295.

Detective Cameron's testimony

PAPD Detective Ron Cameron testified that his role in the investigation involved reviewing jail phone calls and "chirps" using a program called C-Tel available to the PAPD. RP 204–05. The "chirps" are text messages from inmates to persons outside the jail using devices issued by the jail. RP 205–06. Hickson's jail calls and text messages were identified on C-Tel by his name and inmate pin number. RP 207. Cameron applied for a search warrant for the Facebook account named Sunny. RP 217–18.

Cameron identified Ex. 17 as the pre-arraignment no contact order identifying Hickson as the defendant and Chapman as the protected party. RP 209. The order was dated May 25, 2021. RP 211.

Cameron also identified Ex. 16 as the post-arraignment no contact order identifying Hickson as the defendant and Chapman as the protected party. RP 212. This order was entered on June 4, 2021. RP 212.

Cameron began reviewing Hickson's jail calls and text messages from the date of Hickson's incarceration at the beginning May 26, 2021. RP 208. The first text was from June 2, 2021, and the last was June 20, 2021. RP 215–16.

Hickson's text (chirp) messages and jail phone calls

Det. Cameron then testified as to the contents of the Hickson's text messages to Sunny in Ex. 19. 297–98. On June 2nd, Hickson texted someone asking, "do you have my baby momma Sunny Di (sic) on Facebook messenger." RP 299, 300. "Could you message her and either give her this number or ask if she has a text-now number I can message her on." RP 299–300. "She's got like three or four profiles I think, but she uses the Sunny Di or Sunny Dakai (sic)." RP 300. "Are you friends with my youngest son's mom on FB, Sunny Di?" RP 301. "Tell her I

miss her and I really wanna (sic) talk to her." RP 301.

An incoming text to Hickson replies, "The Jess profile says three hours ago, but Sunny doesn't say anything." RP 302. Hickson responded, "Will you message her on both P-L-Z." RP 302. The incoming response stated, "360-889-3134 for Sunny. She just messaged me, it's a text-now number, I'll pay for surgery and drive you there." RP 303. The customer associated with 360-889-3134 on June 2 was identified as customer A and I. RP 304.

A couple minutes later, Hickson sent a text to 360-889-3134 asking, "Sunny?" RP 304. The incoming response stated, "Yes." RP 305. Then Hickson texted Sunny, "I told them she probably had low blood uger (sic) that's how she acts. But it wasn't like they care." RP 305. Hickson adds, "But I think if she went to the courthouse tomorrow and says something that maybe I won't have to sit here till trial." RP 307. He continues, "If they know that Jessica has low blood sugar and the choking was from our sex toys and they gotta drop this." RP 308. "I wish I had the

receipts for the choker I bought." RP 308.

On June 3 Hickson sent texts to the same customer A and I. RP 308–09. Hickson texted, "I'm yours Jessica and I won't try to push you away anymore." RP 309. Hickson adds, "Jessica my bad Sunny." RP 309. Then Hickson asks, "Sunny were those messages earlier ones forwarded from her." RP 310. He continues, "Cause I don't want to be breaking a no contact order with Jessica I just want to know why I'm in here." RP 310.

The Sunny account responds to Hickson as follows: "Baby I need you to stay positive okay. She said that the prosecutor is moving forward with the charges but that he did send everything to your attorney so hound TF out of him and tell him to contact Jess she is waiting for the cops to show up to do a medical release for her blood sugar and then they are going to pick it up. She knows you were trying to get in to help her." RP 311.

Hickson replies, "Please don't do any third party contact to Jessica from me. I don't want any contact with her at all. They're – – the reissued my no contact order with her for some

reason." RP 312.

On June 4, Hickson received a response text stating, "There's no way they can tie you to her is there?" RP 312.

On June 20, 2021, Hickson sent a text to Sunny's account (customer A and I) stating, "They served FB a search warrant." RP 313. The response was "They served one on Sunny Di." RP 313. "Because I refused to" . . . "And I think that profile was shut down anyways." RP 314.

Ex. 20 (summarized)

Detective Cameron then identified Ex. 20 as a copy of the Facebook voice messages between Sunny Dukasis and Benjamin Hickson on May 21, 2021. RP 337–38. Ex. 20 was admitted and published to the jury. RP 340–41.

Hickson: I fucked it up. I was making an effort, I fucking tried. I left everything behind, don't even' have a phone charger. And I was ready to kick your ass. You pushed me, so I couldn't handle it. I didn't want to put my hands on you but I did, I feel fucking

bad. You say you forgive me but you don't. You pushed me, You pushed me. Why am I doing this?

Ex. 22 (summarized)

Cameron then identified Ex. 22 as three jail phone calls to Hickson made May 26, 2021, June 4, 2021, and June 18, 2021, which was previously admitted. RP 293, 342. Ex. 22 was published to the jury. RP 344.

First call

Hickson: Fucking po dunk county.

Unknown: Who do you want me to reach out to?

Hickson: Can you reach out to Shawnee?

Hickson: Sunny Dekak . . I can't remember.

Hickson: Tell her I fucking love her. I need her back on the team bro.

Hickson: Tell her I fucking love her. I fucked up, I get it. I'm taking it to the box.

Hickson: She don't want to testify and it goes away right?

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Second call

Hickson: So stupid of me. So fucking dumb.

Unknown: Be careful of your correspondence with her with her too, you know that right?

Hickson: Yeah I know. I was working it bro, trying to finagle it.

Third call

Hickson: This county is fucked up bro. Detective messaged Sunny.

Ex. 21 (summarized)

Cameron then identified Ex. 21 as jail phone calls to Hickson on May 28 and June 3, 2021, previously admitted in evidence. RP 295. Ex. 21 was published to the jury. RP 345.

First call

Hickson: She has multiple profiles. One is Sunny Dai, D-A-I.

Second call

Hickson: Talked to Sunny. So I guess Jessica went to the prosecutor and told them she made it all up.

Unknown speaker: Who is Jessica?

Hickson: Jessica is the one that put me in here.

Unknown: Who is she now?

Hickson: That's my baby mama.

Unknown: Who is Sunny?

Hickson: Yeah, same.

Unknown: They are the same person?

Hickson: No, wait they are sisters. She talked to prosecutors and told them she made it all up and I don't even know why I'm in here.

Hickson: She has a zoom meeting with prosecutor before court. I'm pretty sure they are just going to kick me out.

Ms. Chapman's testimony

Ms. Chapman testified that she lived at 2405 South Eunice Street, #103 in Port Angeles with her three children for three and a half years. RP 99–101. Chapman testified that no one else lived at the residence but that Hickson had his belongings in the apartment and that she and Hickson have a child in common that was a year and five months old. RP 101.

Chapman testified that on May 21, 2021, she was at home with her three children and Hickson and they were planning to go to Shelton to see Hickson's mother. RP 104. Chapman was trying to get the kids and their things together but that it wasn't going well because she was high on methamphetamine. RP 104. Chapman claimed she had been using methamphetamine for five straight days and had not slept or eaten any food and she had hallucinations. RP 105–06.

On the night before May 21, Chapman was looking through Hickson's phone and saw that Hickson had been talking and sexting with several other females. RP 106. Eventually, Chapman claims she exploded with anger, yelling and throwing things. RP 106–07. Hickson responded by yelling a little and then left the residence leaving behind his bag packed to go to Shelton. RP 107–08. Chapman unpacked Hickson's bag and Hickson got upset when he came back to retrieve it. RP 109.

Ultimately, Chapman testified that Hickson had not acted out physically with Chapman. RP 111.

Chapman testified before the jury that all that day, she had been mixed with drug abuse and had hypoglycemia and was seeing and hearing things and was confused because things didn't make sense and she felt paranoid. RP 114. Chapman remembered calling 911. RP 114.

The recording of the 911 call was admitted as Ex. 8 and played for the jury. RP 122.

Chapman gave her address and immediately reported that Hickson strangled her and he had a knife as dispatch tried to slow Chapman down. Chapman identified Hickson by name and said her neck hurts.

Chapman can be heard sobbing on the call and speaking in distress. She was also concerned that she couldn't keep Hickson out of the house because she couldn't find her house key and her window would not lock all the way. Chapman reconfirmed that Hickson strangled her.

Chapman described in detail what Hickson was wearing and that he is 37 years old. She responded to dispatches questions

about the knife and said she was not sure what kind of knife he had. Chapman said she locked Hickson out of the house.

Chapman could be heard crying some more. When asked where Hickson was at the moment, Chapman stated that she did not know. Dispatch stayed on the phone with Chapman until officers arrived at her door.

Then the prosecution questioned Chapman about the 911 recording. On the call, Chapman provided her correct address. RP 122. Chapman agreed that she stated in the 911 call that she locked Hickman out of the house. RP 123. Chapman stated that she didn't know if she correctly described what Hickson was wearing. RP 123. Chapman was not sure if she gave Hickson's age correctly when she gave his age on the 911 call and she didn't remember what happened after the 911 call. RP 123.

The prosecution then questioned Chapman about what happened after the 911 call when officers arrived and about the letter she provided to them. Chapman claimed that she could not recall anything the officers did and does not remember giving

any officer Hickson's letter in Ex. 1. RP 123–24. Chapman did not remember which room in her house that the letter was found. RP 124.

Chapman claimed at trial that Hickson's statement in the letter that he was disappointed in himself for getting mad enough to put hands on her was not a reference to what happened on May 21, 2021. RP 128. Chapman explained that it was a few days prior when Hickson got sick from a pill and Chapman wanted to have sex but Hickson didn't want to. RP 129. Chapman claimed Hickson's statement about putting his hands on Chapman was about Hickson not feeling well, that she suspected he was talking to other females and that she (Chapman) was being a jerk. RP 129.

After testifying about the note and explaining what Hickson's note was about in detail, Chapman confirmed she did not remember giving it to an officer. RP 130. She remembered being outside with Officer Johnson but when asked if it was after the first or second time she called 911, Chapman stated, "I don't

recall." RP 130–31.

Chapman testified that her neck was not in pain on May 21. Chapman claimed that the change in her voice evident in the 911 call sounded like she had been drinking but that she had not been drinking. RP 132. Chapman said her words sounded like they were slurred but not any hoarser or raspier than normal, and she then said "[t]hat night she had been crying for, like – – and awake for days." RP 132. Chapman did not recall her voice being more horse or raspy than normal. RP 133.

When Chapman was asked if she remembered the officer checking her eyes, she stated that she remembered and she knew what petechiae is (having air cut off) because of her ex-husband and several strangling incidents with him (not Hickson). RP 133–34.

When Chapman was asked who Sunny Dukasis is, Chapman stated that Dukasis is actually several people and that one of them is her and there are several other females. RP 134. Chapman claimed the name was used by herself and her

girlfriends to fish on errant husbands or boyfriends. RP 134–35.

Chapman admitted that she set up the profile for Sunny Dukasis in Ex. 5A and that the pictures were of herself, Hickson, and their son. RP 137. Chapman admitted that the photos in Ex. 5B also contained her photo and Hickson and her son's photo. RP 138.

Chapman did not recall whether she used the Sunny Dukasis Facebook account to contact Hickson on or about May 21, 2021, and claimed that as far as she knew she didn't. RP 154.

Chapman also testified that she sent the prosecutor emails about the case in which she stated that what happened on May 21, 2021, didn't happen the way she reported it. RP 157.

On cross examination, Chapman testified that Hickson never got physical with her on May 21, 2021. RP 158–59. Chapman claimed that the marks on her neck in Ex. 2 and Ex. 3 was from a choker purchased at Castle Megastore because she has a choking and hanging fetish. RP 160–62. Chapman claimed that the marks on her neck were caused by the choker used about

a day and a half before May 21 as part of a consensual sexual act with Hickson. RP 161–62.

Chapman volunteered that they also used a rope and that she has lots of different ropes. RP 162. Then defense counsel handed her defense Ex. 10 which Chapman identified as photos of her bondage gear consisting of 5-point restraints which go around the neck. RP 163. Chapman admitted that she took the photo the day she contacted the prosecution and defense about the fact that things did not happen the way they were reported. RP 164. Chapman confirmed that the photos were taken on May 25 or 26, 2021. RP 164. Chapman claimed that chokers in Ex. 10 were used and caused the marks on her neck. RP 165.

Chapman identified a receipt (Ex. 9) from Castle Megastore dated May 19, 2021. RP 166. On re-direct, Chapman admitted that the one item reflected on the receipt was for a power touch pellet that is not used on the neck and does not strangle anyone. RP 169. Chapman also stated she did not recall making any statements on Facebook about petechiae. RP 170.

Detective Cameron reviewed a Facebook account in the name of Sunny Dukasis. RP 217–18. Cameron identified Ex. 11 and Ex. 12 as Facebook documents showing conversations between Facebook accounts belonging to Hickson and Sunny Dukasis. RP 219. Cameron testified that the Sunny Dukasis account had a specific identification belonging to Jessica Chapman. RP 221–22.

When confronted with the Facebook page in Ex. 11, Chapman admitted that she must have made the statement on the Facebook communication from Sunny Dukasis to Hickson "Benjamin Hickson I have petechia." RP 176–77.

Chapman testified that Hickson did not strangle her or hurt her neck but admitted, but when confronted with Ex. 12, she admitted that she told Hickson that he did strangler her and hurt her neck bad. RP 177–78.

Certified Copy of JABS criminal history

The State moved to admit Ex. 23 as a certified court case summary showing Hickson's prior no contact/protection order

violations. RP 347, Ex. 23. Defense counsel stated that he had no objection. RP 347. Each page of the four-page document has a stamp on the bottom which states "Certificate of Clerk" with a name, signature, and date. Ex. 23. Each page also shows an internet address at the bottom stating in part "https://jabs.courts.wa.gov." Ex. 23. The record was certified as a true copy of documents on file by the clerk of the Clallam County District Court I, State of Washington. Ex. 23

Each page of Ex. 23 includes the name Benjamin C. Hickson with a date of birth of June 23, 1983, and address of 919 Turner Ave., Shelton, WA, 98584. All the violations shown in Ex. 23 are for No Contact/Protection Order Violations and have a finding of guilty date of 05/01/2013. Ex. 23.

On Dec. 21, 2021, Hickson was convicted by a jury of having committed Assault in the Second Degree by Strangulation, Tampering with a Witness, and four counts of Felony Violation of a Court Order. CP 16.

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III. ARGUMENT

A. THE CLAIM OF ERROR RELATING TO ADMISSION OF EXHIBIT 23 MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL AND EXHIBIT 23 WAS PROPERLY ADMITTED AS A CERTIFIED PUBLIC RECORD ADMISSIBLE UNDER RCW 5.44.040 AND ER 902(d).

"The general rule is that appellate courts will not consider issues raised for the first time on appeal." *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (citing RAP 2.5(a); *State v. Tolias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); *State v. McFarland*, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995)).

"Pursuant to RAP 2.5(a)(3), to raise an error for the first time on appeal, the error must be "manifest" and truly of constitutional dimension." *Kirkman*, 159 Wn.2d at 926 (citing *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999); *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988)). "The defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error "manifest,"

allowing appellate review." *Id.* at 926–27 (citing *McFarland*, 127 Wn.2d at 333; *Scott*, 110 Wn.2d at 688).

"If a court determines the claim raises a manifest constitutional error, it may still be subject to harmless error analysis." *Id.* at 927 (citing *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251; *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

"An evidentiary error, such as erroneous admission of ER 404(b) evidence, is not of constitutional magnitude." *State v. Powell*, 166 Wn.2d 73, 84, 206 P.3d 321 (2009) (citing *State v. Everybodytalksabout*, 145 Wn.2d 456, 468–69, 39 P.3d 294 (2002))."

Here, Hickson argues that the court erred by admitting Ex. 23 before it was properly authenticated. The admission of Ex. 23, the certified court record of Hickson's prior convictions for violating a court order, on grounds that it was not properly authenticated is not of constitutional magnitude.

Therefore, this claim may not be raised for the first time on appeal.

Moreover, Ex. 23 was a certified copy of a public record and was therefore admissible under RCW 5.44.040 and ER 902(2)(d) as a public record.

RCW 5.44.040 states, "Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state . . . when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, must be admitted in evidence in the courts of this state."

Under ER 902(2)(d):

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> (d) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the

> custodian or other person authorized to make the certification, by certificate complying with section (a), (b), or (c) of this rule or complying with any applicable law, treaty or convention of the United States, or the applicable law of a state or territory of the United States.

Here, Ex. 23 was certified by the Clerk of the Clallam County District Court as a true copy of a document on file with the Clallam County District Court. Therefore, extrinsic evidence authenticating Ex. 23 was not required for its admission in evidence and the trial court was required to admit Ex. 23 under RCW 5.44.040.

This Court should affirm.

B. THE STATE PRODUCED SUFFICIENT EVIDENCE OF HICKSON'S PRIOR CONVICTIONS FOR VIOLATION OF A COURT ORDER.

For each of counts III through VI, the State had the burden to prove beyond a reasonable doubt that Hickson "has twice been previously convicted for violating the provisions of a court order." CP 87–89.

Hickson argues that Ex. 23, the certified JABS printout showing prior convictions for the State provided insufficient

evidence of two prior convictions for violating a court order and that Hickson is the person who was twice convicted for violating a court order. *See* Br. of Appellant at 8.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220–22, 616 P.2d 628 (1980)).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) (citing *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975)). The reviewing court defers to the trier of fact on issues of conflicting testimony,

credibility of witnesses, and the persuasiveness of the evidence. *State v. Trout*, 125 Wn. App. 403, 409, 105 P.3d 69 (2005) (citing *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996)).

1. The State provided sufficient evidence of two prior convictions for violating the provisions of a court order.

"In proving a prior conviction, the State is not limited to introducing certified copies of the judgment and sentence." *State v. Kelly*, 20 Wn. App. 705, 710–11, 582 P.2d 891 (1978). Other methods may be sufficient such as an admission by the defendant or a certified copy of an abstract of judgment. *Id.* at 711.

Here, the court admitted State's Ex. 23 which is a certified court record showing Hickson's prior convictions for violation of a court order. Ex. 23 shows a case summary of Hickson's no contact/protection order violations available from JABS as shown on the bottom left corner of each page.

JABS stands for "Judicial Access Browser System." Washington Judicial Ethics Advisory Opinion 13–07, 2013 WL 5780438 (2013). "JABS uses a Web browser to display case

history information on certain kinds of cases filed in superior, district, and municipal courts in this state." *Id.* JABS provides judicial officers access to data stored in the Judicial Information System (JIS) database. *Id.*

"The JIS [Judicial Information System] is the Washington courts' information system that in part 'serves as a *statewide* clearinghouse for criminal history information, domestic violence protection orders and outstanding warrants. The benefits of [the system] are the reduction of the overall cost of automation and access to accurate statewide history information for criminal, domestic violence, and protection order history.'" *State v. Cross*, 156 Wn. App. 568, 588, 234 P.3d 288 (2010) (quoting Judicial Information System, Wash. Courts, http://www. courts.wa.gov/jis (last visited June 15, 2010)) (emphasis added).

"The validity and reliability of criminal history reports generated from information in the JIS, such as DISCIS reports, is secure because only Washington State court personnel have

access to the JIS to input case information. As such, the reports generated from the JIS are an official court record." *Cross*, 156 Wn. App. at 588.

Thus, JABS provides judicial officers throughout the State of Washington access to official court records from JIS. In the instant case, Ex. 23 is a JABS printout provided by the Court Clerk for Clallam County District Court I, a Washington State Court. Ex. 23 is therefore an official court record available statewide. Ex. 23 is also reliable as it is information from JIS. *Cross*, 156 Wn. App. at 588.

Therefore, Ex. 23 is sufficient evidence of Hickson's prior convictions for violating no contact orders.

Hickson cites to *State v. Chandler*, *State v. Rivers* for the proposition that the State *may only* use documents comparable to a certified copy of a judgment and sentence to prove prior convictions at trial if the judgment and sentence is unavailable. The above cases are inapplicable to the case at hand.

In, *State v. Chandler*, the Court of Appeals was examining the production of evidence required to prove prior convictions during sentencing after the defendant waives the right to trial and pleads guilty. 158 Wn. App. 1, 5, 240 P.3d 159 (2010). Relying upon *State v. Lopez*, the *Chandler* Court stated, "The State may introduce other comparable evidence *only if* it shows that a certified copy of the judgment is unavailable for some reason other than the serious fault of the proponent." *Chandler*, 158 Wn. App. at 5 (citing *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002) (emphasis added).

Later in *In re Adolph*, the Washington Supreme Court pointed out that, "A close look at the *Lopez* language reveals that this latter statement resulted from confusion generated by calling a certified copy of a judgment the "best evidence" of a prior conviction and is, in fact, the product of a misapplication of the so-called best evidence rule." *In re Adolph*, 170 Wn.2d 556, 566–67, 243 P.3d 540 (2010). The Court declined to follow that language pointing out that it was dicta and not binding. *Id*. at 568.

To correct this confusion, the Court held the correct legal standard for proving prior convictions at sentencing hearings was as set forth in *State v. Ford*: "the best method of proving a prior conviction is by the production of a certified copy of the judgment, but 'other comparable documents of record or transcripts of prior proceedings' are admissible to establish criminal history." *In re Adolph*, 170 Wn.2d at 568 (citing *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999); *State v. Vickers*, 148 Wn.2d 91, 120–21, 59 P.3d 58 (2002)).

Therefore, *Chandler* does not apply to the instant case because it states the standard for proving prior convictions, not at trial as in the instant case, but upon sentencing. Furthermore, the standard used in *Chandler* was incorrect to begin with as pointed out in *In re Adolph*.

State v. Rivers, 130 Wn. App. 689, 128 P.3d 608 (2005) also relies upon the incorrect standard from *State v. Lopez* for proving prior convictions at sentencing. Therefore, *Rivers* is also incorrect and inapplicable to the instant case.

A certified copy of the judgment and sentence for the cases reflected in JIS are not required to prove the prior convictions. Certified copies of court documents are admissible to prove prior convictions at trial and they go to the weight of the evidence to be determined by the jury. *See Kelly*, 20 Wn. App. at 710–11.

Based upon this certified record, a rationale trier of fact could find that there were at two prior convictions for violating a protection order. Therefore, the State produced sufficient evidence of two prior convictions of court order violations.

2. The State provided sufficient evidence that the prior convictions for violating the provisions of a court order belonged to Hickson.

Hickson argues further that the State provided insufficient evidence that the prior convictions in Ex. 23 belonged to the Hickson, the defendant in this case, rather than some other person named Benjamin Hickson. *See* Br. of Appellant at 12.

Citing to *State v. Huber*, 129 Wn. App. 499, 119 P.3d 388 (2005), Hickson argues that Ex. 23 *only* shows the name "Hickson, Benjamin C." with and a date of birth of "06/23/1983"

and that this is insufficient evidence of Hickson's identity under *Huber*. This reading of *Huber* is incorrect.

In *Huber*, the State provided only documents with Huber's name on it to prove that a person named Huber failed to appear for court but did not present any evidence that the defendant at trial was Huber. *Huber*, 129 Wn. App. at 503. In fact, there was no evidence at all admitted at trial tending to identify who the defendant was. *See Id.*

Conversely, there are items the *Huber* Court identified as evidence that could satisfy the State's burden of proof but which were not offered in *Huber*. *See Huber*, 129 Wn. App. at 503. "These may include otherwise-admissible booking photographs, booking fingerprints, eyewitness identification, or, arguably, distinctive personal information." *Id.* (citations omitted).

Here, unlike *Huber*, there is evidence identifying Hickson as the person the prior convictions belonged to. Officer VanDusen identified Hickson in court as the person in the Driver's License Photo in Ex. 7 and as the person that he

encountered May 21, 2021, and that person in the photo and Hickson, the defendant, are one and the same. Even defense counsel, while objecting to the admission of Ex. 7, pointed out that VanDusen already identified the defendant during his testimony. RP 93.

Further, both Ex. 7 and Ex. 23 show more than just Hickson's name and date of birth. Ex. 7 shows Hickson's full name of Benjamin Charles Hickson, date of birth of 6/23/1983, *and address* of 919 Turner Ave, Shelton, WA. Ex. 23 also shows Hickson's name as Benjamin C. Hickson, date of birth of 6/23/1983, *and address* of 919 Turner Ave, Shelton, WA.

The driver's license photo Ex. 7 with Hickson's picture, date of birth, and address and VanDusen's in court identification of Hickson as the defendant and the person in the driver's license photo Ex. 7 corroborates the information in Ex. 23 identifying Hickson as the person convicted of violating a court order.

Therefore, sufficient evidence was presented to establish that Hickson is the person named in Ex. 23 showing prior

convictions for violating a provision of a court order. This Court should affirm.

C. THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO THE ADMISSION OF EX. 23 FAILS BECAUSE OVERWHELMING EVIDENCE IMPEACHED CHAPMAN'S TESTIMONY AND ESTABLISHED THAT HICKSON VIOLATED THE NO CONTACT ORDER.

"Effective assistance of counsel is guaranteed by both U.S. CONST. amend. VI and WASH. CONST. art. I, § 22 (amend. x)." *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996) (citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063–64, 80 L.Ed.2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995)). Claims of ineffective assistance of counsel are reviewed de novo. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

"The test to determine when a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and adopted by [the Washington

Supreme Court] in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 479 U.S. 922, 107 S.Ct. 328, 93 L.Ed.2d 301 (1986)." *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *abrogated on other grounds by State v. Schierman*, 192 Wn.2d 577, 438 P.3d 1063 (2018).

"First, the defendant must show deficient performance. In this assessment, the appellate court will presume the defendant was properly represented." *Hendrickson*, 29 Wn.2d at 77 (citing *Lord*, 117 Wn.2d at 883; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); *Strickland*, 466 U.S. at 688–89).

"In order to show prejudice, the second *Strickland* prong, we must determine that but for counsel's failure to object, the outcome would have been different." *Hendrickson*, 129 Wn.2d at 79 (citing *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995)). The defendant bears the burden of showing prejudice. *Id.*

Any prejudicial effect of the jury's knowledge of Hickson's other convictions of court order violations beyond

the two the State was required to prove is to be viewed against the backdrop of the evidence on the record. *See Hendrickson*, 129 Wn.2d at 80. The defendant may not be able to establish prejudice or that the outcome would have been different where the evidence in the record is overwhelming. *Id.*; *see also State v. Henson*, 11 Wn. App.2d 97, 104, 451 P.3d 1127 (2019) (finding no prejudice where evidence of identify of defendant was overwhelming).

In *Hendrickson*, defense counsel failed to object to the admission of the defendant's prior drug related convictions when facing a charge of delivery of a controlled substance. *Hendrickson*, 129 Wn.2d at 77. The *Hendrickson* Court held that the failure to object to such evidence was defective especially considering that the nature of underlying drug charges. *Id.* at 80.

Nevertheless, the Court also held, that when viewed against the backdrop of the other evidence on record,

Hendrickson failed to prove prejudice because the evidence in the case was overwhelming. *Id.*

1. Chapman's recantation was impeached by overwhelming evidence and the defense theory *admits* Hickson contacted Chapman in violation of the no contact order.

Here, Hickson argues that because Chapman essentially testified that Hickson did not assault her, the State had to impeach her to prove the assault. Hickson asserts that the extra prior no contact order violations made the State's job easier because the prior convictions show that Hickson had a propensity to violate no contact orders and that he sometimes gets away with it. *See* Br. of Appellant at 18. This argument presumably leads to the conclusion that Hickson was prejudiced because the extra prior convictions suggested that Hickson contacted Chapman to improperly influence her testimony which in turn suggests he assaulted Chapman.

Hickson's argument fails because Chapman was thoroughly impeached by overwhelming evidence without the need of the extra priors to suggest he violated the no contact order

to influence her testimony. Additionally, the extra convictions were not needed to prove violation of the no contact order in this case because the defense theory *admits* to Hickson's efforts to contact Chapman in violation of the court order.

Chapman's testimony that Hickson did not assault her was impeached by Chapman's 911 call, testimony regarding law enforcement's response to the incident, Hickson's admissions, apologies, and efforts to influence Chapman's testimony captured in his Facebook communications and jail phone calls, and the fact Chapman's testimony paralleled Hickson's suggestions of what happened in their Facebook texts.

Chapman called 911 the evening of the assault on May 21, 2021. Chapman claimed twice that Hickson strangled her. Her voice was shaky and she was crying throughout the call. She described what Chapman was wearing in detail and that she locked him out of her residence but was concerned because her window would not lock all the way. Further, Chapman's voice sounded hoarse on the 911 call and she was crying when officers

responded to the call at Chapman's residence.

Chapman's statements and behavior in the 911 call were corroborated by the responding officers. Officer VanDusen observed red marks on Chapman's neck and petechiae in one eye. Photographs of Chapman's neck and eye were admitted in evidence as Exhibits 2, 3 and 4. VanDusen also noted that Chapman's eyes were watery and she was upset as she spoke in a raspy and shaky manner. RP 52–53. Officer Johnson who was familiar with Chapman also testified that her voice was noticeably hoarse as well.

Chapman also retrieved and gave VanDusen a letter written by Hickson (Ex. 1) in which Hickson admits he was disappointed in himself for getting mad enough to put hands on her.

Chapman's statements in the 911 call and the responding officer's observations were further corroborated by Hickson's admissions and efforts to influence Chapman to help him beat the charges, all captured on Hickson's Facebook messages,

chirps, and jail phone calls.

Hickson's contacts with Chapman may have been veiled by the use of the vanity name "Sunny Dukasis" on Chapman's Facebook account, but Hickson inadvertently unveiled the subterfuge *twice* when he accidentally addressed Jessica Chapman by referring to her as Jessica instead of Sunny.

Hickson revealed the subterfuge on June 3rd when Hickson's friend asked, "Who is Jessica?" and "Who is Sunny?" Hickson replied "that's my baby momma" and "Yeah same, they are the same person." Then Hickson tried to back track and claim they are sisters. The second time Hickson stated in a chirp text, "I'm yours Jessica! And I won't try to push you away anymore." CP 185 (with corrections). Catching himself, Hickson then tried to back track, "Jessica . . . My bad Sunny." *Id*.

Furthermore, Officer Cameron looked up the account "Sunny Dakasis" on Facebook and learned that Sunny Dakasis is used as a "Vanity Name" and the account username is Jessica Chapman. The account photos showed Jessica, Benjamin

Hickson, and their child in common.

This was confirmed by Chapman when she admitted at trial that she set up the Facebook account named Sunny Dukasis and that the pictures in the account in Ex. 5A and 5B were of herself, Hickson, and their son in common. RP 137–38. Hickson also referred to Sunny as the mother of his son when trying to set up communications with Chapman. Hickson sent a text message asking, "do you have my baby momma Sunny Di (sic) on Facebook messenger." RP 299, 300.

Chapman also admitted that she stated in the Facebook communication to Hickson in Ex. 11, "Benjamin Hickson I have petechia." RP 176–77. Although Chapman testified that Hickson did not strangle her or hurt her neck, when confronted with Ex. 12, Chapman admitted that she told Hickson that he *did* strangler her and hurt her neck bad.

Furthermore, Chapman's testimony about what happened was remarkably similar to what Hickson suggested happened in his Facebook communications to the account named Sunny.

Hickson stated in his texts to Sunny, “The marks on her neck were from us having sex.” RP 306. Hickson added, “I had the receipt for Castle’s Megastore where I bough[t] her a choke collar.” RP 306. Hickson continues, “But I’m sure if she went to the courthouse and told them that was the case they’d have to drop it.” RP 307.

Hickson texted further, “I told them she probably had low blood uger (sic) that’s how she acts.” RP 305. Hickson added, “But I think if she went to the courthouse tomorrow and says something that maybe I won’t have to sit here till trial.” RP 307. “If they know that Jessica has low blood sugar and the choking was from our sex toys and they gotta drop this.” RP 308. “I wish I had the receipts for the choker I bought.” RP 308.

Chapman testified consistently with Hickson’s text messages. Chapman testified that the marks on her neck were caused by the choker used about a day and a half before the incident as part of a consensual sexual act with Hickson. Chapman identified a receipt from the Castle Megastore which

was introduced in evidence by the defense. Chapman also testified that she had hypoglycemia.

Furthermore, the jury heard multiple jail phone calls in which Hickson admitted Sunny and Chapman were the same, in which Hickson apologized for his actions and would take it to the box, and in which Hickson suggested to Chapman to claim she made the whole thing up and the case would go away, and in which he admitted he tried to "finagle" or manipulate Chapman's testimony.

Therefore, there was so much evidence showing that Hickson contacted Chapman in violation of the no contact order (Counts 3-6) and then tried to influence her testimony, that the extra prior convictions for violating no contact orders, all of which were entered on May 1, 2013, were merely an obscure footnote which would have no effect upon the outcome of the trial.

Finally, the defense theory of the case *admits* that Hickson did try to contact Chapman. The defense argued to the jury that

Hickson only tried to make contact with Chapman to get her to tell the truth. *See* RP 392. The defense argued that there was no proof that Chapman received any of the communications. Thus, the jury did not need evidence of Hickson's propensity of violating no contact orders to determine that Hickson did try to contact Chapman in this case.

Furthermore, any prejudicial impact of the admission of the other prior convictions for violating no contact orders is diminished by the fact that the jury would necessarily already be aware that Hickson had a such a history because the State was required to prove two of the prior convictions beyond a reasonable doubt.

Chapman's denial of the assault was impeached by overwhelming evidence. Therefore, the extra prior convictions for no contact/court order violations entered the same date as the two prior convictions which the State was required to prove did not prejudice Hickson by aiding the State in impeaching Chapman. Moreover, overwhelming evidence established

Hickson violated the no contact order between Chapman and himself and his efforts to influence her testimony.

Therefore, the claim of ineffective assistance fails because Hickson cannot demonstrate prejudice. This Court should affirm.

IV. CONCLUSION

The claim that Ex. 23 was not properly authenticated is not reviewable because it was not preserved for appeal.

Hickson's Dept. of Licensing Driver's License Photo and the JABS printout showing his prior convictions both identify Hickson by name, date of birth, and address. Furthermore, Officer VanDusen identified Hickson as the defendant arrested at Chapman's residence and as the person in the DOL photo. Therefore, in the light most favorable to the State, sufficient evidence established that Hickson had two prior convictions for violating a no contact order.

Finally, overwhelming evidence impeached Chapman's testimony. Overwhelming evidence and the defense theory established that Hickson contacted Chapman in violation of the

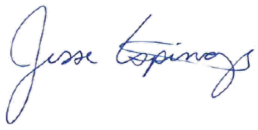
no contact order. Therefore, the extra prior convictions for no contact orders had no prejudicial effect on the outcome of the case.

For all the foregoing reasons, this Court should affirm the conviction.

This document contains 8,570 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 2nd day of December, 2022.

MARK B. NICHOLS
Prosecuting Attorney



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Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically to Thomas E. Weaver on December 2, 2022.

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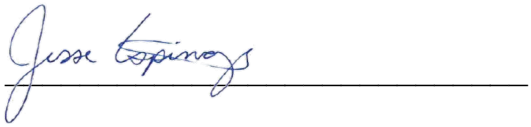

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